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Supreme Court of the United States

OCTOBER TERM 1940

No. 338

WELWEL WARSZOWER, alias "Robert William Wiener," etc.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

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INDEX

CASES

AUTHORITIES

STATUTES

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BRIEF FOR PETITIONER

A writ of certiorari has issued to review an order of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York convicting petitioner of a violation of United States Code Title 22 § 220.

Summary Statement

Petitioner was indicted for the use of a passport obtained as the result of statements alleged to be false (R. 3). Petitioner contends that the use charged—presentation to an immigration inspector upon arrival in New York—was not a use in violation of the statute; that the government failed to prove any presentation of the passport; that the government failed to establish the falsity of at least two of the statements alleged to have been false, thus requiring re-

versal since petitioner separately moved to exclude each of these statements from consideration by the jury (R. 174-179, 180) and the trial judge charged that conviction could result if any of the statements was false (R. 189).

1. Petitioner's contention that the presentation of a passport to an immigration inspector upon arrival is not the kind of use contemplated by the statute rests on similar considerations to those advanced by the defense in *United States* v. *Browder*, 113 F. 2nd 97, No. 287 of this Term, and the Circuit Court in the case at bar rested entirely on that decision in this regard.

2. Petitioner's contention that there was no proof of the presentation of the passport requires an analysis of the evidence.

The only evidence of the presentation of the passport was that of Inspector Faire. He testified that he examined incoming passengers on the S. S. Normandie on September 30, 1937 (R. 45). He had no recollection of petitioner (R. 46). He was shown a portion of the ship's manifest (Exhibit 6, p. 211), which, it was assumed, had been prepared by the purser (R. 42, 49), but which had been signed by the witness (R. 45). The purser did not testify. This manifest listed the names of various persons who were admitted as American citizens (R. 41). It showed numbers opposite the names (R. 41). Opposite the name of petitioner was the number 332207 (R. 211). This was the number of the passport issued on the application made by petitioner (Exhibit 1, p. 206, R. 23). Faire had placed check marks opposite each name (R. 45, 51), but there were no checks against the numbers (R. 211).

Faire testified on direct examination that petitioner had presented his passport, the witness giving as his reason for so testifying that it was his practice to ask for a passport whenever a number appeared on the list opposite the passenger's name (R. 46). He assumed, evidently, that a passport was in fact produced. On cross-examination, however, he said that it was not necessary for an incoming passenger to show a passport to establish his citizenship and thus his right to enter (R. 48); a birth certificate, or any other satisfactory means of identification, would suffice (R. 48, 49 *cf.* 91). And Faire expressly said that he did not indicate on the manifest the nature of the identification produced (R. 49). When questioned by the Court as to the significance of the check mark, Faire said that it did not necessarily indicate that a passport had been shown (R. 50). Thus proof that petitioner had actually presented a passport was lacking. We shall, hereafter, go more fully into this testimony.

3. Petitioner's contention that matters were improperly submitted to the jury presents important and substantial questions of law. Petitioner asserted that, as to two of the alleged false statements, the only evidence offered by the government consisted of admissions made by him and that no conviction can rest upon uncorroborated admissions—especially where the crime charged is not an act but a statement. In other words, the government tried to prove that petitioner had made a false statement at the time of application for the passport merely by showing that on an earlier occasion he had made a different statement.

This phase of the case arose from the charge that petitioner had falsely stated that he was a citizen of the United States (R. 3) and that he had not resided outside the United

States (R. 3). The government showed that petitioner had stated that he was a citizen of Russia on arrival in 1914 (Ex. 19, p. 229), in his 1918 registration record (Ex. 21, p. 232) and in a reentry application of 1932 (Ex. 13, p. 220). The government showed also that he had been out of the United States from April 19th to June 5, 1932 (R. 212-213)—but this short absence can surely not be considered a "residence" abroad—and that, when he came to Philadelphia in 1914, he stated that he was born in Russia (Ex. 19, R. 229).

The Circuit Court of Appeals ruled that these admissions corroborated each other and were also corroborated by evidence of a forged birth record purporting to show birth in Atlantic City (R. 259). But the Court primarily held that the rule as to admissions had no application where the admissions relied on were made before the crime charged, rather than thereafter (R. 258, 259).

Jurisdiction

This Court has jurisdiction under Judicial Code § 240 Subdivision "A".

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit is officially reported at 113 Fed. 2nd 100.

Questions Presented

1. One issue here presented is the question involved in *Browder* v. *United States,* namely the interpretation of United States Code Title 22 § 220, never heretofore considered, whether the presentation of a passport to an immi-

gration officer upon landing in New York is a use within the meaning of that statute.

2. Another issue is whether a conviction for use of a passport can be upheld when the only witness of such alleged use had no independent recollection of the presentation of the passport and testified that the records on which he relied did not necessarily show a use of the passport.

3. The case also presents the question whether a conviction can be had on evidence of uncorroborated admissions made before the crime charged, especially where the crime charged was a false statement and each alleged admission was merely a different statement from the corresponding later one.

4. Finally, the case presents the question whether there was any corroboration of the admissions.

POINT I

The "use" of the passport relied upon by the Government constituted no violation of Section 220, Title 22.

This issue is presented by Assignments of Error 4, 11, 19, 23 (R. 248, 249, 251). It is based on appropriate motions made at the end of the Government's case (R. 165, 172-174) and renewed at the end of the entire case (R. 180). The adverse rulings were excepted to (R. 174, 181).

In the case at bar the Circuit Court of Appeals did not specifically discuss that question here presented, relying

merely on what had been decided in the *Browder* case, 113 F. 2nd 97 (R. 297). While that case is now before this Court on writ of certiorari, being No. 287 of this Term, an independent discussion of the subject seems called for because in the *Browder* case counsel for petitioner have based their argument in large part upon the fact there conceded that Browder was a citizen, a fact which in the case at bar is one of the material issues. At some risk of duplication, therefore, of matter already covered in the *Browder* case, we offer the following for consideration of the Court.

The statute upon which the indictment rests was part of the so-called Espionage Act of June 15, 1917 which was entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage and better to enforce the criminal laws of the United States, and for other purposes." Title IX of this Act consists of four sections which are Sections 213, 220-222 of Title 22 of the Code. Title 22 is entitled "Foreign relations and intercourse." The first of these sections provides for the manner of issuing passports. The second section punishes the making of false statements "wilfully and knowingly" for the purpose of obtaining a passport and also—and it is this portion of the section under which this indictment is found—punishes a person who

> "shall wilfully and knowingly use or attempt to use, or furnish to another for use, any passport, the issue of which was secured in any way by reason of any false statement."

The third section punishes the use of a passport issued to someone other than the person using it or the use of such a

passport in violation of the restrictions contained in it or of the rules dealing with the issuance of passports. The last section punishes the forging or mutilation of a passport or the use of an expired passport.

The meaning of the statute.

It will be noted that there is nothing in this statute which requires the use of an American passport in connection with the departure or entry into the United States of any person, whether citizen or alien. A law that did require both aliens and citizens to have passports was enacted in 1918 entitled "to prevent, in time of war, departure from or entry into the United States contrary to the public safety." Its provisions, so far as not repealed, now form Sections 223-226 of Title 22 of the Code. Section 2 of that Act, which lapsed in 1921, prohibited a citizen from either leaving or returning to the United States without a valid psssport. The other sections are applicable to aliens but have nothing to do with the use of an American passport. They deal only with the necessity for an American visa on a foreign passport. In 1921 with the end of the war, all of the passport restrictions would have expired. However, Congress extended the provisions that applied to aliens (See Section 227 of Title 22.)*

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*The criminal provisions of the 1918 Act, however, were not so extended. See *Flora* v. *Rustad,* 8 F. 2nd 335; *United States* v. *One Airplane,* 23 F. 2nd 500. Moreover, as to immigrants subsequent legislation has completely terminated the effect of the 1918 law. See *Johnson* v. *Keating,* 17 F. 2nd 50—although it has been held that the old law applies to non-immigrant alien visitors. See *United States ex rel. London* v. *Phelps,* 22 F. 2nd 288 and *United States ex rel Komlos* v. *Trudell,* 35 F. 2nd 281.

Other regulations with regard to passports have been enacted from time to time, such as the Act of July 3, 1926, Title 22, Sections 211-a and 214-a, and the Act of May 16, 1932, Title Section 217-a. These later statutes are not germane to the issues now before the Court.

Petitioner contends that the use made a crime by the Espionage Act is a use of the passport *qua* passport, not a use of the passport in some connection unrelated to the purposes for which a passport is issued. It has been repeatedly declared that a passport is not issued for the purpose of securing the entry of a person into the United States, but only for the purpose of fostering his travel abroad. See Borchard, Diplomatic Protection of Citizens Abroad, p. 493; Hunt, The American Passport, p. 4; Executive Regulations, issued June 7, 1911, Rule 4, continued in 1914, 1915, 1916 in 1917.

It is our contention, therefore, that Congress did not intend to make it a criminal offense for a person to use a passport in connection with his return to this country. When Congress intended to punish a person for attempting to enter by showing an invalid passport, it did so, in 1918, by express provision requiring a valid passport as condition of entry. But this legislation has not been in effect since 1921. Moreover petitioner was not prosecuted thereunder.

Nor can it be said that this argument can have no application to this petitioner because the Government contends that he is an alien. Our argument does not rest upon the citizenship or the non-citizenship of the user. It rests upon the fact that the showing of a passport for purposes of entry is not, under any provision of law or any regulation of government, a *use* of the passport. Only during the period 1918-1921 could such showing be said

to have been a use—and then only because of the express legislation. It, therefore, now makes no difference whether the person showing the passport is a citizen or not. Moreover, we submit that in the case at bar the Government has failed to prove that petitioner is not a citizen. The only evidence on the subject of his citizenship rests on his own admissions, as we have already indicated. There is no corroboration whatever of these admissions. Under such circumstances the Government has not sustained the burden cast upon it by law. This was the express ruling in *Duncan* v. *United States,* 68 Fed. 2nd 136, fully discussed hereafter.

It cannot reasonably be contended that Congress in this highly penal statute intended to punish as a use of a passport any display of that passport for any purpose whatever. In order to determine what Congress did have in mind it is proper to consider the purpose for which the act was passed. As appears from the meager discussion in the Congressional records, the purpose of the bill was to protect American neutrality. (See statement of Senator Overman, 65th Congressional record, First Session, p. 3439; annual report of Attorney General 1917 p. 73). This view is confirmed by the discussion preceding the enactment of the 1918 legislation (H. R. 65th Congr. 2d Sess. Report 485). That these various provisions of the passport laws were not intended to deal with the entry of persons into the United States is borne out by *Flora* v. *Rustad,* 8 F. 2nd 335. There Judge Lewis said (in 1925) at page 337:

> "It has never been the policy of this Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation

has been the remedy. A reversal of that policy ought to be based on a clear legislative declaration."*

The word "use" has been frequently construed not to apply to conduct which, though literally a use, was not within the objects of the statute in question. Thus in *Bailey* v. *State,* 150 Tenn. 598, a conviction was reversed based on a statute which prohibited the use of an automobile without the permission of the owner when applied to a person who, while pushing an automobile across the road, lost control of it, with resultant damage. In *People* v. *Ryan,* 230 App. Div. 252, suit was brought to recover a penalty for violating an act forbidding the use of a milk bottle bearing the name of a milk dealer without the permission of that dealer. The Court held that the statute in that case was intended to apply to one dealer improperly using the bottle of another, not to a consumer who accepted the milk in an improper bottle, even though he later returned the empty bottle to the dealer from whom he received it. See also *Bill* v. *Stewart,* 156 Mass. 508; *Martin* v. *Bowker,* 163 Mass. 461.

Section 220 of Title 22 was enacted to punish a use of a passport secured to enable persons to travel abroad under claim of American citizenship; there was no purpose on the part of Congress to punish the showing of a passport in this country merely as a means of identification. It can make no difference whether the passport would be so "used" for the purpose of identifying the holder in getting a check cashed at a bank, or even for getting a money

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***The Act of March 4, 1929, Title 22, § 180a discussed on page 11 constituted such a reversal.**

order cashed at a post office, or by showing it, as claimed in the case at bar, to an immigration inspector upon return from abroad.

Nor can it be urged by the Government that if the use of a passport for purposes of entry by an alien may not be punished under this section, then his wrongful act remains unpunished. Congress has enacted legislation which permits the punishment of any alien who obtains entry by means of a passport improperly obtained. The Act of March 4, 1929, United States Code Title 8, Section 180-a, punishes an alien who obtains entry to the United States by a wilfully false or misleading representation or the wilful concealment of a material fact. Upon proper proof that defendant in the case at bar was indeed an alien, this statute would apply to the use for the purposes of entering the United States of an American passport because if the applicant were an alien the use of the passport would constitute a wilfully false statement concerning citizenship.

Moreover, petitioner could have been prosecuted under Title 18 U. S. C. A. § 141 (Act of March 4, 1909) for falsely claiming to be a citizen if the proof justified such a charge.

It is submitted, therefore, that the Government has, in the case at bar, misconceived the provisions of law under which this petitioner could have been prosecuted, if guilty of wrongdoing. If the Government could show that he was an alien, he is subject to prosecution under Titles 8 and 18. Whether an alien or a citizen he cannot be punished under Title 22 Section 220 because the showing of the passport at the time of entry is not the use of a passport *qua* passport, is not such use as was contemplated by this highly penal statute.

The statute if construed as contended for by the Government would be unconstitutional.

We submit, moreover, that the construction contended for by petitioner here avoids an unconstitutional application of the statute. It is, of course, beyond need for argument that the word "use" found in Section 220 must be given the same meaning as the same word found in Sections 221 and 222, all three sections having been enacted at the same time. (See *Llewellyn* v. *Harbison,* 31 F. 2nd 740, 742; *In re Associated Gas & Eletcric Co.,* 11 F. Supp. 359, 365). Section 221 punishes "use" of a passport in violation of the conditions contained therein. Section 222 punishes "use" of a passport that has become void. These provisions would necessarily prohibit the use of a passport after its date of expiration. If, as contended for by the Government, the showing of a passport to obtain entry into the United States constitutes a "use" of a passport, then it becomes a penal offense for a person to show an expired, though validly obtained, passport when returning from Mexico or Canada or any other place, travel to which requires no passport at all. The showing of a passport under such circumstances is a perfectly lawful and wholly innocent act.* . Congress could not possibly constitutionally punish such act. See *Stromberg* v. *California,* 283 U. S. 359; *deJonge* v. *Oregon,* 299 U. S. 353 and *Lanzetta* v. *New Jersey,* 306 U. S. 451. This Court should, therefore, construe the statute as contended for by petitioner in order to avoid any question of its constitutionality. See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351; *Chippewa Indians* v. *United States,* 301 U. S. 358, 376.

***And it is customary: See N. Y. Times, July 19, 1940, p. 10, col. 1.**

The conclusion is thus inescapable that in order to prevent the punishment of acts wholly lawful, the statute must be so construed as to exclude from its scope the mere showing of a passport for purposes of entry into the United States. That being so, there was no use in violation of the law in the case at bar.

The Circuit Court decision in the *Browder* case.

In *United States* v. *Browder,* 113 F. 2nd 97, the Circuit Court of Appeals recognized that at the time the statute in question was passed it did not apply to the use of a passport for purposes of identification to facilitate entry into the United States, such use being then relatively uncommon since American citizens practically never obtained passports. The Circuit Court contended, however, that the statute could now be applied to such a use on the ground that "this application to a given state of facts may change as new things or new uses of old things come into existence." In support of this contention the Circuit Court cited *DeLima* v. *Bidwell,* 182 U. S. 1; *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, and *Maxwell, Interpretation of Statutes,* 6th Ed., pp. 144, 145.

The cases are scant authority for the use made by the Circuit Court of the well accepted general rule that a statute may become applicable to things not known at the time the statute was enacted if those things are of a nature to fall within the description of the statute—as a statute which refers to weapons will cover types of weapons not yet invented when the statute was passed.

Both the cases cited deal with the status of Puerto Rico. In the *Bidwell* case the question was whether or not that island was a "foreign country" under the tariff law; in

the *Shell Company* case it was whether or not it had become a "territory" of the United States under the Sherman Anti-trust Act. In both cases the Court held that Puerto Rico, had, so far as the applicable statutes were concerned, become part of the United States. The *Bidwell* case has no real application to the problem now before the Court since the only relevant question there considered was whether it must be held that Puerto Rico continued to be foreign because it had been foreign at the time the law was enacted. This Court dealt very shortly with that argument and its decision of the same clearly has no application to the case at bar. The *Shell Company* case, although closer, because it is a holding that something came under a law which was not under it at the time of its passage, is also logically not relevant here. For there was involved in that case that extension to a species of a genus to which Maxwell refers at the very page cited by the Circuit Court of Appeals.

It is significant, however, that the statement from Maxwell which is cited follows a subheading entitled: "Beneficial Construction". The pertinent portion of the discussion follows:

> "Except in some cases where a statute has fallen under the principle of excessively strict construction, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards came into existence is a species of it."

Taking the analysis indicated by Maxwell it seems clear that the employment of a passport in order to reach a country not in existence when the law was passed would

be a "use" punishable under the law—that would be the extension of the law to a new species of the genus concerned, that genus being foreign countries. But merely because it had become convenient to employ a passport to identify the holder upon entry into the United States it cannot properly be held that such an employment of a passport is a use of the same under this law since there is nothing in the law to indicate that it was passed to punish an employment of a passport which had no relation to its essential function as passport, namely, for use in traveling in foreign countries.

Further on Maxwell, in discussing the construction of penal laws at page 477 says:

> "Again, as illustrative of the rule of strict construction, it has been said that while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws may not * * *."

This, being a criminal case, the rule of strict construction must apply.

It is submitted, therefore, that nothing in the discussion by the Circuit Court of Appeals or the authorities cited by that Court justifies the application of this statute in the case at bar.

POINT II

There was no evidence to justify submission to the jury of any question of petitioner's presentation of a passport.

This issue is raised by Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 24 (R. 248, 249, 251) and arises from motions made both at the end of the Government's case (R. 165-172) and at the end of the entire case (R. 180) for a directed verdict on the ground that even if the presentation of a passport to the immigration inspector on September 30, 1937 constituted a use within the statute, nevertheless, the evidence of such presentation was absent. Exceptions were noted to the rulings complained of (R. 172, 181).

Proof of the presentation of the passport was essential to the prosecution's case. A conviction arrived at without such proof would be a denial of due process. See *Fiske* v. *Kansas,* 274 U. S. 380; *Cantwell* v. *Connecticut,* 310 U. S. 296. It is necessary, therefore, for this Court to review the evidence in order to determine whether or not there was any proof of the presentation of the passport sufficient to permit the submission of the case to the jury.

Here the government relied on but a single witness, the immigration inspector Faire. He expressly said that he had no independent recollection of the arrival of petitioner (R. 46). Therefore his testimony concerning the alleged presentation of a passport by petitioner on his arrival—the vital fact to be proved—was entirely circumstantial. It is petitioner's contention that a fair and impartial scrutiny of all the testimony necessitates the conclusion that the testimony did not exclude the hypothesis of innocence. It left open the hypothesis that petitioner presented some document

other than a passport as identification. Consequently proof of guilt beyond a reasonable doubt was lacking.

The law on the subject is clear and uniformly adopted. Some recent applications may be found in *Nosowitz* v. *United States,* 282 Fed. 575; *Romano* v. *United States,* 9 F. 2nd 522; *United States* v. *McNaugh,* 42 F. 2nd 835; *Stone* v. *United States,* 47 F. 2nd 202; *United States* v. *Park Ave. Pharmacy,* 56 F. 2nd 753; *United States* v. *Ruffino,* 67 F. 2nd 440; *United States* v. *Buchalter,* 88 F. 2nd 625; *United States* v. *Silva,* 109 F. 2nd 531. See also *Rivera* v. *United States,* 57 F. 2nd 816, *Neal* v. *United States,* 102 Fed. 2nd 643 and *Boatright* v. *United States,* 105 F. 2nd 737.

The Government's contention, as accepted by the Circuit Court of Appeals (R. 258) was "that the entry of the passport number on the manifest enabled him (Faire) to say with assurance that he had been shown the passport." The contention is unfounded because the presence of the passport number on the manifest at the time the witness examined the passenger justified only the inference that a passport would be asked for, not the further inference necessary for conviction that the passport had been presented. It is important to bear in mind that the witness, Faire, made a careful distinction between what he knew because of his "invariable" practice and what might have happened merely because of general (*i.e.* variable) practice. It was his "invariable practice" to ask for the presentation of a passport whenever, as here, there was a passport number on the manifest (R. 46). Had the crucial issue in this case been the question whether or not a passport had been asked for no complaint could have been made of its submission to the jury. But in this case that was not the issue. The fact for the jury to find was whether or not a passport had been presented, not whether it had been

asked for. On the subject of the presentation of the passport Faire's testimony clearly shows no invariable practice. He states at one place that it was "customary" for American citizens to present their passport (R. 49), but he expressly said on cross-examination that it was not necessary for them to do so and that they might identify themselves by other means such as birth certificates (R. 48), and on further questioning by the Court he stated that the check-mark against the name on the manifest indicated that the passenger had been admitted as a citizen but "not necessarily" that he had been admitted on a passport (R. 50). There is, therefore, no room for the drawing of any inference that in the particular case, of which the witness had no recollection whatever (R. 46), a passport had in fact been presented.

The first inference, namely that a passport had been asked for, was justifiable. That petitioner was admitted as a citizen is clear. But to infer that petitioner was admitted on a passport is inadmissible, is building inference upon inference.

Thus, from the point of view most favorable to the prosecution, the jury was asked to base an inference upon an inference (See R. 180), to infer from the fact that a passport was always asked for that in this particular case it had been shown, although no direct evidence that it was shown was presented and the evidence was clear that petitioner might have been admitted without a passport. Such building of inference upon inference has been consistently condemned in both civil and criminal cases. See *United States* v. *Ross,* 92 U. S. 281; *Manning* v. *John Hancock Insurance Company,* 100 U. S. 693; *Chicago, etc. Railroad Company* v. *Coogan,* 271 U. S. 472; *Smith* v. *Pennsylvania Railroad Company,* 239 Fed. 103.

But, in any event, the evidence is consistent with the hypothesis of innocence. The testimony in this case rests entirely on the manifest of the steamship Normandie (Government's Exhibit 6, R. 211). That showed a "List of United States citizens". It contained 30 names opposite each of which was a "passport number" and other data concerning place of birth, naturalization and residence. There were checkmarks against the names of all the persons on that list, but no checkmarks against any of the numbers. The list was apparently prepared by the purser (R. 42, 49). The witness, Faire, who was the only witness for the Government with regard to the alleged presentation of the passport, had nothing to do with the preparation of the list (R. 49). He merely signed it at the bottom (R. 45) and made the checkmarks against the names (R. 51). The testimony of Faire clearly shows that the manifest would be in the same form whether a passport was presented or whether some other means of identification was used (R. 48, 50). Thus the manifest was susceptible of an interpretation favorable to petitioner. And since Faire had no recollection of the occurrence (R. 46) there is a possibility that no passport was presented.

After stating that he had examined a great number of persons on incoming passenger ships, Mr. Faire said that he had no independent recollection of the arrival of defendant (R. 46). He said:

> "Q. Do you have any independent recollection of the arrival of this particular individual, Robert Wiener? A. No, I don't."

He was then asked the following questions:

> "Q. Can you state from looking at the manifest, Mr. Faire, whether or not the passport of the indi-

vidual Robert Wiener was presented to you? A. Yes, sir, I can.

"Q. On what do you base your statement? A. The number of the passport, No. 332207, is entered on the manifest and it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me" (R. 46).

The last part of this answer was not intended by the witness to describe an "invariable" practice of the actual presentation of passports. His own invariable practice, based on the number on the list, was that he always asked for a passport, but as the rest of the record shows his invariable practice went no further than that. For, on further examination, he testified that it was not the invariable practice of passengers to present passports, that other means of identification might be presented, and that there would be no notation on the manifest to indicate that such other identification had been presented (R. 49).

On cross-examination Mr. Faire said that an American citizen did not need a passport in order to enter, that he could use anything which would satisfy the inspector as to his identity as an American citizen (R. 48). He might present a birth certificate, if the passport had been lost (R. 48, *cf.* 91). Then Mr. Faire said:

"Q. Any proof that would satisfy you of his American birth would pass him into the country as an American citizen? A. That is right.

"Q. It wouldn't have to be a passport? A. No.

"Q. Did you make any writing on the list of names as to what the people showed you yourself? A. No, I did not" (R. 49).

On re-direct examination the witness gave an affirmative answer to the direct question whether or not defendant had presented his passport in the particular case (R. 49), but on further cross-examination he explained that he based this answer only on the fact that there was a passport number on the manifest (R. 50).

And since the number on the manifest was not marked by a check its mere presence there proved no more than that a passport would have been asked for. In view of the witness' testimony that no notation of the presentation of other means of identification would have been made on the manifest (R. 49) the manifest itself throws no light whatever on the crucial issue in this case, the presentation of the passport. Whether a passport had been presented or other identification had been presented, the manifest would have appeared in the identical form in which it is now in the record (R. 211).

Finally, in close questioning by the Court the witness made it clear beyond any doubt that the admission of petitioner as a citizen was "not necessarily" based upon his presentation of a passport:

> "The Court: * * * Do you mark on that manifest when a man identifies himself,—do you make any entry on the manifest when a man identifies himself as an American citizen?
>
> "The Witness: The whole manifest is of American citizens.
>
> "The Court: And when the man presented his passport what did you do?
>
> "The Witness: That check mark shows he was admitted as a United States citizen.
>
> "The Court: On a passport?
>
> "The Witness: Not necessarily.

"The Court: Can you tell us whether he had a passport?

"The Witness: From the fact the number of the passport appears there.

"Q. And you checked——

"Mr. Fowler: That is objected to.

"Q. Did you check the information on the manifest with information in the passport? A. That is correct" (R. 50).

This last statement is, however, pure supposition on the part of the witness, since he remembered nothing of the incident.

The substance of the testimony, therefore, is that the witness, having no recollection of the incident, supposes that a passport was shown in the particular instance only because there was a number on the list and he had made a checkmark against the name. But the first fact permits the inference only that a passport had been asked for and the second only that the passenger was admitted as a citizen. The inference that he was admitted on a passport is negatived by the rest of the testimony since the witness admitted that means of identification other than a passport might have been produced, that in such a case there would also be a checkmark against the name without any specific notation of the nature of the other means of identification. Finally, when pressed by the Court, the witness said that the checkmark indicated only that the person was admitted as a United States citizen and not necessarily that he was admitted on a passport.

In considering this point the Circuit Court stressed the witnesses' repeated statements "that the entry of the passport number on the manifest enabled him to say with as-

surance that he had been shown the passport" (R. 258): The difficulty with the Court's paraphrase of the testimony is that it leaves out decisive portions of it. It is our contention that the testimony must be considered as a whole and that so considered it lacks the proof essential in a criminal case. This becomes evident when the entire manifest in evidence is examined (R. 211). The page there shown consists entirely of American citizens (R. 50). In each instance there was a passport number; in each instance a checkmark, not against the number, but only against the name. The witness Faire had not put any number on the list (R. 49), but only the checkmark against the name (R. 51). The purpose of that checkmark was to show that the person named was admitted as an American citizen (R. 50). Citizenship is determined by the document presented as identification—and the witness testified that it did not have to be a passport (R. 48-49).

Moreover, the witness was unwilling to testify, in answer to the Court's question, that the presence of the checkmark meant that the person whose name had been checked had been admitted on a passport: the answer was "not necessarily" (R. 50). It is apparent, therefore, that Faire was not prepared to state that every person on that manifest had in fact shown a passport. Thus there was a possibility that one or more of the persons on the list had not shown a passport, despite the fact that each name was accompanied by a passport number. And since the witness had no recollection of petitioner (R. 46) it might have been petitioner who had shown something other than a passport with which to identify himself. And no testimony about "invariable practice" can overcome that "not necessarily."

The case is similar to *People* v. *Weiseman*, 280 N. Y. 385. In that case the Court of Appeals of the State of New York by Chief Judge Crane reversed a conviction and dismissed the indictment because no proper inference of guilt could be drawn. The charge there was escaping from custody while a prisoner. The evidence of the People indicated that defendant might have slipped out while a policeman took out other prisoners. However, the People's testimony also established that each of the persons who went out with this policeman was specifically accounted for. The Court pointed out that the inference which might have been permissible from the first part of the testimony was contradicted by the second part of the testimony and that under such circumstances defendant's guilt had not been proved beyond a reasonable doubt. Chief Judge Crane said at page 389:

> "The People's case is made up on the inference that Weiseman must have slipped out when Devine took out his nine prisoners. This might have been a fair inference if it were not for the fact that these same People's witnesses contradict it."

So in the case at bar any ambiguity in the first part of Faire's testimony is clarified by the second part of it. The testimony as a whole is lacking in proof of the presentation of the passport. No proper finding of guilt is, therefore, permissible.

POINT III

The Trial Court erred in submitting to the jury the issues of non-citizenship and residence abroad.

The question arose because of petitioner's contention that issues had been submitted to the jury without any evidence to sustain the government's contention other than admissions by petitioner. The government charged that petitioner had made four false statements (R. 3); that his name was Wiener; that he was an American citizen; that he was born in Atlantic City, New Jersey, on a specified date; that he had never resided outside the United States. At the trial petitioner moved separately to exclude from the jury's consideration each of these four statements (R. 174-179, 180). Exceptions were noted to the Court's refusal (R. 174-181) and error duly assigned (Ass. 12-16, R. 249, 250). Since the Trial Court twice charged the jury that it could convict if it found any one of the statements false (R. 189, 194) there can be no doubt that error was committed if the jury was improperly permitted to consider any one of these four statements.

In support of that proposition of law petitioner, in the Circuit Court, relied on *Nash* v. *United States,* 229 U. S. 373; *Stromberg* v. *California,* 283 U. S. 359; *Patterson* v. *United States,* 222 Fed. 599; *Loomis* v. *United States,* 61 F. 2nd 653. The government did not then take issue with this contention and the Circuit Court assumed the rule to be applicable.

The point was properly raised at the trial.

However, in opposition to the application for certiorari herein, the Government contended that the question of the

insufficiency of the evidence had not properly been raised at the trial. That contention is entirely without merit. The Government's argument was apparently based on the fact that trial counsel had not excepted to the Trial Court's charge (R. 189, 194), that the jury might find petitioner guilty if convinced that any one of the four statements in the passport application was false. However, it was unnecessary for petitioner to except to those portions of the charge because petitioner had previously moved to withhold from consideration by the jury each one of the four statements, and had excepted to the refusal so to rule. If the Trial Court was right in submitting all four statements to the jury then it was correct in instructing the jury that it might find petitioner guilty on the basis of any one of the statements. It would have been impertinent under those conditions to have excepted to that charge. The error of the Trial Court was not in the charge, but in the denial of the motions to withdraw from consideration by the jury the two statements particularly relied upon now.

Moreover, the attention of the Trial Court was expressly called to the point relied upon by petitioner here. Petitioner was not content merely to move for a directed verdict, nor even to move that each of the four statements be withheld from the jury on general grounds. Petitioner specifically asked the Court to withhold from the consideration of the jury the second statement relied upon by the Government (the one dealing with citizenship) on the ground that the evidence in support of that statement was insufficient because it consisted only of admissions. Counsel made the motion to withhold on the express ground "that all the evidence introduced by the government is in the nature of admissions * * *. The important thing is the

failure to introduce independent corroborative proof" (R. 175) and the Court's attention was called to the *Duncan* case, 68 F. 2nd 136. It is clear, therefore, that as to this alleged ground of the prosecution's case the attention of the Trial Court was specifically called to the point raised by the petitioner in the Circuit Court of Appeals and now urged upon this Court. (See also R. 176.)

Likewise, with regard to the fourth statement, (the one dealing with residence abroad), a similar motion was made on the express ground that there was a failure of corpus proof "and admissions standing on their own here are not sufficient to let the matter go to the jury" (R. 179).

Petitioner preserved all his rights by excepting to the denial of both these motions (R. 175, 179).

That the Circuit Court of Appeals considered the issue properly raised is evident from the failure of that Court in its opinion to question petitioner's right to raise the same. This is all the more significant because that same Court had in recent cases such as *United States* v. *Dilliard,* 101 F. 2nd 829; *United States* v. *Rebhuhn,* 109 F. 2nd 512; *United States* v. *Mascuch,* 111 F. 2nd 602, and *United States* v. *Smith,* 112 F. 2nd 83, rejected similar arguments because counsel had not in those cases adequately presented the issue at the trial. The essential difference between that group of cases and the case at bar is that in those cases there were merely motions to dismiss separate counts, whereas in the case at bar there were specific and separate motions to withhold from the consideration of the jury each one of the four alleged false statements, all of which combined constituted but one count.

It is therefore evident that petitioner properly called the Trial Court's attention to the point now being raised

and that if any one of the four alleged false statements was improperly submitted to the jury the judgment of conviction cannot stand.

The applicable rule of law.

We come, therefore, to the basic problem. Was there sufficient evidence to go to the jury as to each one of the four statements alleged to have been false? Petitioner contends that as to two of them there was not, since the only evidence consisted of his own declarations. The government to prove non-citizenship relied solely on statements made by defendant reproduced in the manifest of S. S. Haverford of 1914 (Ex. 19, p. 229), in the registration record of 1918 (Ex. 21, p. 232) and in the reentry application of 1932 (Ex. 13, p. 220)—statements which indicated birth in Russia. Thus the government sought to establish that the 1936 passport statement of American birth was false not by proof that petitioner was born elsewhere, not even by a declaration of petitioner's that his 1936 statement was false, but merely by showing that petitioner had previously made different statements. Petitioner is shown to have made two inconsistent statements, but there is no proof as to which is false.

So, in attempted proof of residence abroad the government relied only on the same Haverford manifest (Ex. 19, R. 229). The brief absence in 1932, from April 19th to June 5th (R. 213, 212) can not be considered a "residence" (*Transatlantica Italiana* v. *Elting,* 74 F. 2nd 732; *In re Carnera,* 6 F. Supp. 267).

We shall deal hereafter with the claim of the government that there was independent corroboration of these admissions, a claim the Circuit Court appears to have

accepted (R. 258, 259), in so doing again conflicting with other courts. But since the main reliance of the Circuit Court was on the rule of law devised by it in conflict with other circuits we believe a square issue has been presented for disposition by this Court.

In the Circuit Court petitioner had contended that the general rule precluding conviction on admissions alone applied to this case. The government did not challenge the rule thus contended for, claiming only that there had been corroboration. This claim rested in part on the matters adverted to by the Circuit Court, to be discussed hereafter, in part on the contention that proof of the presentation of the passport was corroboration of one element of the crime and thus sufficient—a contention negatived by *Forte* v. *United States*, 94 Fed. 2nd 236. This latter contention on the part of the government was not mentioned by the Circuit Court in its opinion.

Instead the Circuit Court laid down a new rule of law, namely, that a conviction could rest on the unsupported declaration of a defendant made before the commission of the crime. In justification of that doctrine the Circuit Court argued that the rule contended for by petitioner had arisen as protection against an untrue confession, "coerced or psychopathic". Therefore, said the Court, the policy of the rule did not apply to declarations made before the commission of the offense.

The distinction thus made is an interesting one. There is no doubt that a higher probative value should be given to declarations made without the motive to falsify which exists when a person is charged with crime, and, to some extent, the law has taken cognizance of relative motivations. Various exceptions to the hearsay rule, such as the law of

dying declarations, evidently rest on such psychological con
siderations. But in the field of criminal law the requiremen
of independent proof of the *corpus delicti* goes beyond th
narrow grounds of confessions obtained by coercion o
because of the accused's psychopathic disposition. It i
entwined with the presumption of innocence (*Clayton* v
United States, 284 F. 537). It rests on the evident fac
that people often tell untruths and that convictions restin
upon uncorroborated statements more often are unjust tha
otherwise.

The general rule barring convictions on uncorroborate
confessions or admissions is of ancient origin and uniforn
application. Until the case at bar it appears never to hav
been challenged by judicial authority. It is true tha
Professor Wigmore casts doubt upon its wisdom, as
matter of policy (Wigmore on Evidence, Third Edition
1940, Sec. 2070, 2071). But he expressly admits that in th
United States the courts have uniformly adopted the rul
that corroboration was necessary, moved apparently b
Greenleaf, who said (Greenleaf on Evidence, Sec. 217):

> "This opinion certainly best accords with th
> humanity of the criminal code."

Moreover, Professor Wigmore cites as jurisdictions i
which the corroborating evidence must concern the *corpu*
delicti the following:

> The United States, Alabama, Arkansas, Cal
> fornia, District of Columbia, Connecticut, Florida
> Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa
> Kentucky, Louisiana, Michigan, Minnesota, Mis
> souri, Mississippi, Montana, Nebraska, Nevada
> New York, Ohio, Oklahoma, Oregon, Pennsylvania
> Puerto Rico, South Carolina, Texas, Utah, Vir
> ginia, Washington, and West Virginia.

The rule is similarly cited as a general one by Chamberlayne, The Modern Law of Evidence, (1911), Sec. 1598, where he recognizes that the rule is one, not of evidence, but of substantive law "based upon what is assumed to be in the interest of public policy." And Underhill on Criminal Evidence (4th Edition, 1935), says on page 42:

> "A voluntary confession or admission of the accused is not sufficient to prove the *corpus delicti* unless there is other evidence tending to support the same, either direct or circumstantial; or, in other words, a confession or admission by the accused to prove the corpus delicti must be 'corroborated'."

In considering the purpose of the rule, it must be borne in mind that this rule is applied in addition to the strict rule with regard to the admissibility of confessions and that it is universally adhered to, even though the circumstances attending the making of the confession indicate that it is genuine—those circumstances merely affect the admissibility, not the sufficiency, of the confession. Even corroboration of essential elements found in a confession does not affect this rule. As Underhill says at page 43: "Corroboration of a confession does not necessarily prove the *corpus delicti.*" citing *People* v. *Besold,* 154 Calif. 363; *Allen* v. *State,* 4 Ga. Ap. 458.

It is thus evident that neither the rule dealing with the admissibility of confessions nor the rule affecting their sufficiency depends upon the fact that in a particular case the statements contained in the confession may have inherent plausibility or even may have been independently corroborated. Such corroboration merely permits these facts to come before the jury. (See Chamberlayne, Sec. 1614).

The proposition contended for here, that the rule applies as well to admissions as to confessions is sustained by ample authority. This is expressly stated by Underhill not only in the passage already quoted, but also on page 506, where he says:

> "Admissions alone will not support conviction, as *prima facie* proof of the *corpus delicti* is necessary before they may be considered, and such admissions must be corroborated and considered with all the other circumstances."

It is true that Professor Wigmore intimates the contrary to be the case, but not by any express statement to that effect or by the citation of any authority whatsoever, saying only:

> "Whether the accused's statement amounts to a confession so as to require corroboration under the present rule depends on the definition of a confession" (Sec. 2074).

This question was expressly passed upon by the Circuit Court for the Eighth Circuit in a case decided just after the decision in the case at bar, *Gulotta* v. *U. S.* 113 F. 2nd 683. In that case defendant was convicted for having falsely represented himself as a citizen of the United States, qualified to vote, when in fact he had been born in Italy and had not been naturalized. To prove the falsity of the claim of American birth the Government introduced in evidence a statement made subsequent to the alleged crime, in which defendant declared that he had been born in Italy. The Government also introduced in evidence a statement made twenty years before the alleged crime, in which defendant declared his intention to become an American citizen and

then declared that he was an Italian citizen, and a passport purporting to have been issued in Italy thirty-five years before the date of the alleged crime, which stated defendant's birth to have been in Italy. The passport, although received as an admission, was rejected as independent evidence of foreign citizenship because it was not authenticated. The evidence as a whole was held insufficient because it consisted only of admissions made by defendant. The Court expressly rejected the Government's contention that in this respect there was any distinction between confessions and admissions. The Court did not expressly discuss the distinction made in the case at bar between declarations preceding the commission of the crime and those succeeding it. However, in that case two of the three statements relied upon by the Government had been made long before the commission of the alleged crime. Many cases were cited by Judge Thomas in support of the contention that the rule applies as well to admissions as to confessions. Two of these cases are of particular pertinence here because the only declarations there relied upon by the Government were declarations made before the commission of the crime.

In *Duncan* v. *United States,* 68 F. 2d 136 (9th Cir.), defendant was convicted on three counts: for false statements in obtaining a passport, which included a statement of birth at a particular time and place; for falsely representing himself as a United States citizen; for perjury in making the statements in the application for the passport. The Circuit Court upheld the conviction on the first and third counts because there was independent evidence that defendant had not been born at the time and place indicated —evidence stronger indeed than similar evidence in the case at bar because it was shown in the *Duncan* case

that defendant was in fact born elsewhere. But the Court reversed the conviction on the second count because there was no independent evidence of foreign citizenship. There, as here, the government relied on declarations made by the defendant before the commission of the crime—on the manifest of the original entry, and on applications for life insurance, for a marriage license and for naturalization.

In *Gordnier* v. *United States,* 261 Fed. 910, the same Court reversed a conviction for failure to register under the draft. The only proof that defendant was of the required age consisted of declarations concerning his age which defendant had made on earlier occasions. Such declarations, being but expressions by defendant of his own belief, the Court held could not form the basis of conviction of crime. Before sending a man to jail the government should establish that the earlier statement attributed to defendant really represented the facts.

In a number of state cases, statements made before the commission of the crime have been held insufficient in the absence of corroboration of the *corpus delicti: People* v. *Lambert,* 5 Mich. 349 (bigamy); *People* v. *Isham,* 109. Mich. 72 (adultery); *Hiler* v. *People,* 156 Ill. 511 (bigamy); *Green* v. *State,* 21 Fla. 403 (bigamy) see also *People* v. *Simonsen,* 107 Cal. 345 (false pretenses).

There is particular justification for the application of this rule to a case, like the present, where the charge is the making of two inconsistent statements. Without some proof that one of these statements is true and the other false, conviction should not follow. This has been recognized in prosecutions for perjury.

The analogy from the law of perjury is peculiarly apt in this case as the essence of that crime is false swearing,

which is in effect the charge made against the defendant here. A study of the perjury cases discloses that it is insufficient to convict an accused of perjury merely by showing that he made two or more contradictory statements.

The general rule in the United States in perjury cases is stated by Wharton, as follows:

> "When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false." (Wharton's Criminal Law (12th Ed.) Vol. 2, Sec. 1583.)

In all the perjury cases applying this rule, not one makes the distinction made by the Circuit Court in the instant case, between contradictory statements or admissions made before the event and those made after the event. On the contrary, there have been many reversals of conviction made upon contradictory statements or admissions alone, although they were made prior to the alleged criminal act.

Thus, in *People* v. *McClintic,* 193 Mich. 589, where the defendant testified twice under oath, contradicting himself the second time, the Court reversed a conviction of perjury based on the later testimony, saying (at p. 601):

> "We think that it should be held that a conviction for perjury cannot be sustained merely upon contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement."

In *State* v. *Carter,* 315 Mo. 215, a conviction of perjury was likewise reversed, where the sole proof of falsity was

demonstrated by prior inconsistent statements of the accused. The Court said at page 217:

> "* * * It was not sufficient to prove only that appellant made statements concerning such acts and admissions contradictory to his testimony when sworn and examined as a witness in respect thereto."

In *Clayton* v. *United States, supra,* the defendant made certain statements to the police and thereafter contradicted those statements when testifying before the Grand Jury. The Court reversed the conviction, saying (at p. 539):

> "In prosecutions for perjury it has long been settled that not only must the guilt of the accused be established beyond reasonable doubt, as in other criminal cases, but that the falsity of the matter sworn to by him must be proved by direct and positive evidence."

In *Paytes* v. *State,* 137 Tenn. 129, the defendant was convicted of perjury for testifying at a trial contrary to his prior testimony before the Grand Jury. The conviction was reversed, the Court stating the rule as follows (at p. 131):

> "But by a decided weight of authority the courts of this country declare the rule that in order to sustain a conviction for perjury it is not sufficient to prove merely that the accused at different times made, or testified to, two statements that cannot be reconciled; and that there must be some additional testimony as to the falsity of the matter in respect of which perjury is averred."

Other cases in accord are:

Phair v. *United States,* 60 Fed. 2nd 953;
People v. *Chadwick,* 4 Cal. App. 63;
Richardson v. *State,* 45 Ohio, App. 46;
Billingsley v. *State,* 49 Texas Cr. 620.

This Court has just recognized the validity of that general rule:

United States v. *Harris,* decided Dec. 9, 1940.

It is obvious, therefore, that the Circuit Court, in the instant case, erred when, although accepting the general rule requiring the corroboration of extrajudicial admissions, it limited the scope of the rule to admissions made after the alleged crime. No other court in the United States has ever made that distinction.

The weakness of that distinction may be further shown if we assume, for the moment, that the defendant had made the alleged false statements concerning his citizenship and residence while testifying in court instead of in a passport application. Under the rule laid down unanimously by the cases above cited, he could not be convicted of perjury merely by proving that he had made prior inconsistent statements. Independent evidence of the falsity or *corpus delicti* of the later statements would be necessary.

Yet, in the instant case, the Court departed from the universally recognized rule and held that independent proof was unnecessary. Surely, this departure cannot be justified because the defendant was not charged with perjury in a court of law. The essence of the defendant's alleged crime and the essence of the crime of perjury is false swearing, and the rule governing one is equally applicable to the other.

To sustain the conviction of the defendant on contradictory statements made by him, without requiring independent evidence of the *corpus delicti,* is to depart from our long established traditions of Anglo-American law, which require, in every case, that there be proof that a crime was actually committed, outside of the extrajudicial statements of the defendant alone.

To the argument of policy which may be advanced by the government the answer of this Court should be that such questions of policy are for the Congress, not for the Court.

See Holmes, *J.* in *Beutler* v. *Grand Trunk Rwy.,* 224 U. S. 85, 88, 89.

After all, it is to be supposed that a diligent prosecutor will be able to obtain corroboration of the facts disclosed by admissions. That in an exceptional case this may prove impossible is no reason for rejecting a rule so well established and so universally applied. The decision in the case at bar is not only in conflict with all previous authority, but is indeed the first expression of a distinction never before even suggested. We believe it to be unsound and that it should be rejected by this Court.

The alleged corroboration.

As we have already pointed out, petitioner contends that certain issues had been improperly submitted to the jury because the evidence consisted only of admissions. The Circuit Court overruled this contention in part by holding that there had been corroboration (R. 258). In so doing it stated that it preferred the rule it had laid down many

years ago in *Daeche* v. *United States,* 250 F. 566, to the rule recently laid down by the Court of Appeals for the District of Columbia in *Forte* v. *United States, supra.* In that case the Court pointed out that the corroboration had to be of every essential element of the crime other than the identity of the wrongdoer. In the case at bar evidence was accepted as corroborative which merely "fortified" the truth of the admissions. The difference between the two rules is fundamental.

Moreover, there is conflict between the decision in the case at bar and that in the *Duncan* case *supra.* For in both cases the evidence was of similar character. In both the manifest at the time of first entry indicated foreign birth and nationality; in both defendant presented a certificate of native birth and the evidence permitted the inference that the record behind the certificate had been forged; in both defendant had repeatedly declared that he was an alien. These items were declared corroboration in the case at bar; they were rejected as corroboration in the *Duncan* case. To be sure there was in the case at bar some very vague proof that petitioner had not applied for naturalization (R. 71, 72). On the other hand in the *Duncan* case, defendant was proved to have been a party to the forgery of the native birth record and in that case there actually was proof of foreign birth; in the case at bar there was no proof of this kind whatever.

The difficulty with the argument of the Circuit Court in the case at bar arises from a failure separately to consider the various elements of the crime charged against him. Thus in discussing corroboration the Court linked together the declarations "of name, alienage, foreign birth and residence abroad." Of course, there was corrobora-

tion of petitioner's use of two names and he has never contended otherwise. And petitioner did not, in the Circuit Court, complain of the submission to the jury of the issue of his place of birth. But on the two relevant issues, alienage and residence abroad, we submit there was no corroboration.

The Circuit Court referred in the general discussion to three items of proof: the 1914 manifest; the forged Atlantic City record; the testimony about naturalization. The second and third of these could have no possible bearing on the issue of residence abroad and the first is not independent corroboration at all, since the manifest was, for all that appears, based only on the declarations of petitioner. Indeed counsel for the government so conceded at the trial (R. 177). Evidence of this kind was expressly held not corroboration in the *Duncan* case, and properly so. Thus it appears that there was no corroboration whatever of petitioner's declarations with respect to at least one of the issues submitted to the jury.

And with respect to the other, the question of alienage, the supposed corroboration is wholly insufficient. The manifest, we submit, may not be considered, being but an admission at second hand. The fact that the Atlantic City record was questioned is, under the *Duncan* case, insufficient, and on good logic. It but excludes one possible native birth and in no way even indicates foreign birth, much less foreign citizenship. Nor does the vague proof that petitioner had not applied for naturalization corroborate his declarations of foreign birth, since a failure to apply for naturalization is consistent, rather than inconsistent with the later claim of native birth. While, in the *Duncan* case, this proof was lacking, and its absence commented on, in

that case there was proof of foreign birth; therefore proof that there had been no naturalization might establish non-citizenship. But here the evidence outside the declarations adds nothing; it does not even "fortify."

Consequently there was insufficient evidence to justify submission to the jury of the issues of non-citizenship and residence abroad and, at the very least, a new trial must be had.

Conclusion

It is respectfully submitted that the judgment should be reversed and the indictment dismissed on the ground that the use alleged to have been made of the passport was not a violation of the law and any construction of the law which made such a use a violation of it would render other cognate provisions of the same law unconstitutional; and also on the ground that the government failed to prove a presentation of the passport as charged. At the least, appellant is entitled to a new trial because the Court erred in submitting to the jury two of the four alleged misstatements and in permitting the jury to find appellant guilty on the basis of any one of them when the evidence in support of these two was insufficient.

Respectfully submitted,

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